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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ADAM LUNA,

Defendant and Appellant.

B289358

(Los Angeles County  
Super. Ct. No. VA145049)

APPEAL from a judgment of the Superior Court of the  
County of Los Angeles, Robert J. Higa, Judge. Affirmed.

Melcher & Melcher, William Paul Melcher, for Defendant  
and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Senior Assistant  
Attorney General, Scott A. Taryle, Supervising Deputy Attorney  
General, and Nancy Lii Ladner, Deputy Attorney General, for  
Plaintiff and Respondent.

## I. INTRODUCTION

A jury found defendant Joseph Luna guilty of possession of methamphetamine for sale. On appeal, defendant contends that the trial court violated his due process right to a fair trial by admitting the opinion testimony of the prosecution's drug expert that defendant possessed methamphetamine for sale "beyond a reasonable doubt." According to defendant, that testimony was highly prejudicial and grounds for a mistrial.

We hold that, because the trial court struck the challenged testimony immediately after it was presented, admonished the jury to disregard it, and then properly instructed the jury on reasonable doubt, the court did not abuse its discretion by denying defendant's motion for mistrial. We therefore affirm the judgment.

## II. FACTUAL BACKGROUND

### A. *Prosecution's Case*

On the morning of June 16, 2017, City of Bell Detective Jaime Baltazar and others observed "makeshift tents" under the Slauson Avenue bridge, in the City of Bell near the 710 freeway. Detective Baltazar announced his presence and "asked everyone to step out" of the tent, and began "checking individual tents." In one of the tents, the detective observed "[defendant lying] . . . in a fetal position facing [him] . . . with his eyes closed and his hands hidden." He ordered defendant "to come out," but defendant "didn't move." When the detective saw the blanket covering defendant move, he removed it. The detective again told

defendant “to come out,” but defendant refused. In response, the detective “grabbed [defendant’s] shoe and . . . tossed it at him,” hitting him in his legs.

Detective Baltazar then “made [defendant] come out” of his tent and saw him “grabbing onto” his left front pocket. The detective ordered defendant “two or three times” to “let go of his [pant] pocket[], but he [refused],” prompting the detective to reach “into [defendant’s] left front pant pocket” and remove “a glass jar” with “black tape around the top” that contained “a crystal-like substance that resembled methamphetamine.”<sup>1</sup> Detective Baltazar also noticed a “clear wallet” containing currency hanging from a “rope chain around [defendant’s] neck” and removed it. He then took defendant to a waiting patrol vehicle for transportation to the Bell Police Department.

According to Detective Baltazar, during the 15 or 20 minute period from initial contact to transport, defendant did not appear to be under the influence of methamphetamine. Moreover, the detective did not find on defendant “any type of smoking device,” needles, or “anything else that someone who uses methamphetamine would use to ingest [it].”

Officer Bill McCullah responded to the Slauson Avenue bridge location at the request of Detective Baltazar. He transported defendant, the jar containing suspected methamphetamine, and a wallet containing currency to the Bell

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<sup>1</sup> Ten days after defendant’s arrest, Detective Baltazar weighed the methamphetamine recovered from him and determined it weighed 26.35 grams. Criminalist Michael Adeva also weighed the recovered methamphetamine at the crime lab and confirmed that it weighed 26.36 grams, plus or minus 0.0018 of a gram.

Police Department. There, the officer conducted a preliminary test of the suspected narcotic substance which tested “positive for methamphetamine.” He then sent the substance to a lab for confirmation.<sup>2</sup> He also counted the currency in the wallet, which totaled \$85. With the exception of one \$20 bill, the other bills were in denominations of \$5 or less.

Sergeant James Corcoran testified for the prosecution as a drug expert. According to Sergeant Corcoran, a useable amount of methamphetamine—i.e., “a dose that brings on the [symptoms] of methamphetamine”—is .25 or one-quarter of a gram. One gram of methamphetamine had a street value of \$20 to \$40; an “eight ball” or 3.5 grams of methamphetamine had a street value of \$50 to \$100; a half ounce or 14 grams had a value of \$250 to \$300; and an ounce or approximately 28 grams had a value of \$300 to \$500.

Sergeant Corcoran opined that defendant possessed the 26.35 grams of methamphetamine for sale. He based that opinion on the following factors: the quantity of methamphetamine recovered, which was the equivalent of 104 individual doses; the absence of any evidence of drug paraphernalia used to ingest the drug; the fact that defendant was unemployed, yet in possession of \$85 in cash, which was “a lot of money to have if you’re [living] under a bridge;” the glass container which was a “marketing tool for sales;” and the tape on the container which was used by “drug couriers” to seal the container “to elude the detection of a drug dog.”

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<sup>2</sup> Criminalist Adeva subsequently subjected the substance recovered from defendant to testing in the crime lab and confirmed that it tested positive for methamphetamine.

Sergeant Corcoran explained that the lack of evidence of “pay/owe sheets” or scales did not affect his opinion because defendant was likely dealing in cash with the other homeless people living under the bridge and may have intended to sell the entire amount of methamphetamine, just under an ounce, without breaking it into smaller amounts or individual doses.

Sergeant Corcoran had never seen a drug user ingest more than one gram at one time, and three grams in one day would be “a lot for the system.” Moreover, he had never seen or heard of a user ingesting 26.35 grams in one day.

#### B. *Defense Case*

John Jenks, a forensic addiction specialist and licensed private investigator, testified as a drug expert for the defense. He was a former law enforcement officer who had worked four years as an undercover narcotics investigator.

In Jenks’s experience, the most methamphetamine a user could ingest in a day was 16 grams or a little over one-half ounce. According to Jenks, users who smoke the drug “use a lot more than people [who] eat, drink, or snort [it].”

In response to a hypothetical question that assumed facts similar to those at issue in this case, Jenks explained that he did not have enough information to conclude that methamphetamine recovered from the hypothetical defendant was possessed for sale. Based on the facts provided, he did not know if the hypothetical defendant was a user or, if he was a user, how long he had been a user, the method of ingestion, or the purity of the drug.

Jenks further explained that the fact a given defendant may not show signs of methamphetamine intoxication at the time

of arrest was inconclusive on the issue of possession for sale because habitual users develop a high tolerance for the drug and often do not exhibit the typical signs or symptoms of intoxication.

Given the limited information provided, Jenks could not rule out the possibility that the \$85 and the amount of the methamphetamine recovered were for personal use. He also believed the glass jar with the taped top was inconsistent with possession for sale.

### **III. PROCEDURAL BACKGROUND**

In an amended information, the Los Angeles County District Attorney charged defendant with possession of a controlled substance for sale in violation of Health and Safety Code section 11378. The District Attorney alleged that defendant had suffered three prior convictions for which he had served prison terms within the meaning of Penal Code section 667.5, subdivision (b).

Following trial, the jury found defendant guilty as charged, and defendant admitted the three prior convictions. The trial court sentenced defendant to the middle term of two years and struck the prior conviction allegations.

### **IV. DISCUSSION**

Defendant contends that the improper opinion testimony of the prosecution's drug expert—that it was beyond a reasonable doubt that defendant possessed the methamphetamine for sale—was an inadmissible opinion about guilt and, as such, highly prejudicial.

A. *Background*

On cross-examination, defendant's counsel questioned the prosecution's drug expert, Sergeant Corcoran, about his opinion that the quantity of methamphetamine recovered from defendant indicated that it was processed for sale, not personal use. During that questioning, the following exchange took place.

"[Defendant's counsel]: So if a person is addicted to

methamphetamine, in your experience, talking to thousands of people who have used methamphetamine, do they use their money and their resources to support their addiction? [¶]

[Sergeant Corcoran]: They do. [¶] . . . [¶] [Sergeant Corcoran]:

They do, but it's an interesting phenomenon. [¶] If I had to generalize, I would say, they acquired just enough for the next fix. Just enough. [¶] The Costco defense is out. [¶]

[Defendant's counsel]: So the Costco defense has no applicability.

[¶] Nobody buys more methamphetamine planning ahead? [¶]

[Sergeant Corcoran]: You can never say no, but in a case of an individual living under a bridge . . . in that case, absolutely not.

[¶] [Defendant's counsel]: It's beyond possibility that a person who lives under a bridge could buy more methamphetamine than they consume in one day. [¶] Correct? [¶] [Sergeant Corcoran]:

It's not beyond possibility, *but it's beyond a reasonable doubt*. [¶]

[Defendant's counsel]: It's beyond a reasonable doubt. [¶]

What's a reasonable doubt to you? [¶] [Prosecutor]: Objection.

Speculation. Calls for Speculation. [¶] The Court: All right. [¶]

Sustained. [¶] [Defendant's counsel]: We're going to strike the

answer? [¶] The Court: We're going to recess now, ladies and gentlemen." (Italics added.)

Outside the presence of the jury, defendant's counsel moved for a mistrial, arguing that Sergeant Corcoran's reference to the beyond a reasonable doubt standard was an improper opinion concerning defendant's guilt and "incredibly prejudicial." During the ensuing argument, the prosecutor suggested that the trial court could strike the answer and admonish the jury not to consider it. Following further argument, the trial court instructed counsel to "look for a case," observing that "[t]his is pretty serious."

After a break, the trial court noted that the court and counsel had reviewed the opinion in *People v. Vang* (2011) 52 Cal.4th 1038 [discussing limitations on law enforcement expert opinion], and invited further argument. Defendant's counsel maintained that opinions on guilt and innocence are inadmissible and that a curative instruction would not ameliorate the prejudice, stating, "It's an insurmountable obstacle to giving [defendant] a fair trial." When defendant's counsel renewed his motion for mistrial, the trial court responded, "[The] motion is denied. [¶] I will advise the jurors to disregard any reference to that phrase and then we'll [move] forward."

The following proceedings were then held in the presence of the jury. "[The Court:] All right, ladies and gentlemen, during the examination, the witness referred to the phrase 'beyond a reasonable doubt' two or three times.<sup>3</sup> [¶] You're to disregard

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<sup>3</sup> In response to an earlier question from defendant's counsel, Sergeant Corcoran stated, "Anything is possible, but I'm saying beyond a reasonable doubt that [25 grams of methamphetamine] would be [too much for personal use] and you have to take into consideration the other factors involved." But defense counsel did



that completely. [¶] Disregard it. [¶] Strike it. [¶] And I will instruct you on what reasonable doubt or beyond a reasonable doubt is. [¶] And *it is for you to decide whether any fact has been prove[n] beyond a reasonable doubt.* [¶] *Totally your duty.* [¶] Do you all understand this idea? [¶] Anybody not understand what I just said? [¶] All right.” (Italics added.)

During the reading of the jury instructions, the trial court advised the jury that it was the prosecution’s burden to prove defendant’s guilt beyond a reasonable doubt and defined the reasonable doubt standard for the jury.

## B. *Legal Principles*

### 1. Mistrial Motions and Standard of Review

“A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.’ (People v. Haskett (1982) 30 Cal.3d 841, 854. . . .)” (People v. Alexander (2010) 49 Cal.4th 846, 915.)

“In reviewing rulings on motions for mistrial, we apply the deferential abuse of discretion standard. (People v. McLain (1988) 46 Cal.3d 97, 113. . . .)” (People v. Wallace (2008) 44 Cal.4th 1032, 1068.) That standard also applies to review of a trial court’s decision to give a curative instruction in lieu of declaring a mistrial. (People v. Navarrete (2010) 181 Cal.App.4th

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not object to the witness’s use of the term “beyond a reasonable doubt,” move to strike it, or request a mistrial at that time.

828, 834 [(*Navarrete*)].) A trial court’s exercise of such discretion “will not be disturbed except on a showing [that] the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation].’ (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10 . . . .)” (*People v. Peoples* (2016) 62 Cal.4th 718, 745; see also *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 502-503 [abuse of discretion “will be found where a court acts unreasonably given the circumstances presented by the particular case before it”].)

## 2. Curative Instructions

It is well established that a trial court has broad discretion to rely on instructions and admonitions to cure any potential prejudice to a defendant from improper testimony inadvertently presented to the jury. In *Navarrete, supra*, 181 Cal.App.4th 828, the Court of Appeal explained: “Ordinarily, a curative instruction to disregard improper testimony is sufficient to protect a defendant from the injury of such testimony, and, ordinarily, we presume a jury is capable of following such an instruction.” (*Id.* at p. 834.) Similarly, the Supreme Court has observed that “[w]e normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an ‘overwhelming probability’ that the jury will be unable to follow the court’s instructions, *Richardson v. Marsh*, 481 U.S. 200, 208 (1987), and a strong likelihood that the effect of the evidence would be ‘devastating’ to the defendant, *Bruton v. United States*, 391 U.S. 123, 136 . . . (1968) [(*Bruton*)].” (*Greer v. Miller* (1987) 483 U.S. 756, 767, fn. 8.) “It is only in the exceptional case that ‘the improper

subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions.” (*People v. Allen* (1978) 77 Cal.App.3d 924, 935.) In such cases, “the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.” (*Bruton, supra*, 391 U.S. at p. 135.)

### C. *Analysis*

In his opening brief, defendant does not expressly challenge the trial court's order denying his motion for mistrial. Instead, his challenge on appeal is directed at the trial court's purported admission of the challenged opinion testimony of Sergeant Corcoran. Specifically, defendant argues that “[t]his court reviews [a] trial court's *admission of [evidence]* for abuse of discretion” and “[t]his court may reverse [defendant's] conviction if the *erroneous introduction of expert testimony* was prejudicial.” (Italics added.) In doing so, defendant ignores the fact that, in response to defendant's motion for mistrial, the trial court struck the challenged expert testimony and admonished the jury to disregard it.

Given the trial court's response to defendant's mistrial motion, this appeal cannot fairly be characterized as a challenge to the trial court's admission of the expert's testimony. The offending testimony was inadvertently presented by the expert after he had already used the same phrase in front of the jury without objection from the defense. Thus, the challenge on appeal is more accurately characterized as a challenge to the trial

court's denial of the mistrial motion and decision to rely on a curative instruction to remedy any potential prejudice.

As explained above, a trial court's decision to rely on a curative instruction in lieu of granting a mistrial is reviewed for abuse of discretion. Here, the record demonstrates that the trial court's decision was reasonable in light of the circumstances. Immediately after the expert made the challenged statement about reasonable doubt, the trial court excused the jury and discussed the issue with counsel in light of defense counsel's request for a mistrial. The trial court described the issue as "pretty serious" and then took a recess to allow counsel to conduct legal research and present case authority and further argument. After considering the authority presented by counsel and hearing further argument, the trial court decided to strike the challenged testimony and admonish the jury to disregard it. The jury was thereafter not only advised that the challenged testimony had been stricken from the record and was not to be considered in determining defendant's guilt on the possession for sale charge, it was also specifically advised that "it [was] for [the jury] to decide whether any fact ha[d] been proven beyond a reasonable doubt," and then properly instructed on the concept of reasonable doubt.

In light of the trial court's reasoned response to the inadmissible evidence, we perceive no basis for finding an abuse of discretion. There is no indication in the record that the jury misunderstood the trial court's admonishment and instructions and nothing to suggest that the jury did not, or could not, follow the trial court's advisements. Defendant has failed to demonstrate that this was an "exceptional case" in which the harm from the improper testimony could not be removed by use of a curative instruction.

## V. DISPOSITION

The judgment is affirmed.

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KIM, J.

We concur:

BAKER, Acting P. J.

SEIGLE, J. \*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.